IN THE CIRCUIT COURT OF PULASKI COUNTY, VIRGINIA.

MARTHA J. BOND *v.* MITCHELL BOND.

Curtesy—Requisites—Birth of Issue—Legitimated Child.—A child born out of wedlock but afterwards legitimated by virtue of § 2553 of the Virginia Code of 1904, namely, by the subsequent marriage of the parents and recognition of the child by them, is not a sufficient compliance with the common-law requisite, that to entitle the husband to an estate by the curtesy in the wife's lands, issue must be born alive during the coverture.

THORNTON L. MASSIE, J. The sole question presented for decision in this case is whether the defendant, Mitchell Bond, is entitled to an estate by the curtesy in the lands described in the bill. No question is raised as to the form of the proceedings, and no demurrer is interposed to the bill, but, by consent of parties, the court is asked to decide the only question presented for decision, viz.: Has the defendant, Mitchell Bond an estate by the curtesy in the lands of which his wife, Martha Bond, died seized and possessed.

The agreed facts in the case are as follows:

Nancy Johnson inherited from her mother, Martha Johnson about seventy-five acres of land, situate in Pulaski County. Nancy Johnson had two illegitimate children before her marriage with Mitchell Bond, the defendant in this case. One of these children, the daughter of Mitchell Bond, died under twenty-one and without issue. The other, Martha J. Bond, who was not the child of Mitchell Bond, is the plaintiff in this case. Nancy (Johnson) Bond, her mother, died in December, 1907, in possession of the lands in controversy, leaving, surviving her, her husband, Mitchell Bond, and her daughter, Martha J. Bond, the plaintiff. It is admitted that the child who died was an illegitimate child of Nancy Bond and the defendant, Mitchell Bond, and was born before the marriage of these parties which took place in March, 1876; and that Mitchell Bond, the father, after their marriage, recognized her as being his child.

It is further admitted that all the requisites for an estate by the curtesy in the land exist, except one, viz., issue born alive during the coverture. As to this, the plaintiff insists that, this

requisite not existing, curtesy must be denied, whilst defendant insists that, the child being legitimated by virtue of Sec. 2553, Va. Code, 1904, she is to be considered as born in lawful wedlock.

It is also admitted that defendant is in possession of title papers to which the plaintiff is entitled, if curtesy is denied.

Section 2553 is as follows:

"If a man, having a child, or children, by a woman, shall afterwards intermarry with her, such child, or children, and their descendants, if recognized by him, before, or after, marriage, shall be deemed legitimate."

It is true that the illegitimate child was legitimated under this statute, and was given all the rights of inheritance that she would have possessed, had she been born in lawful wedlock, but, can it be said that the effect of the statute is to enlarge the estate by the curtesy and give it where it was not allowed before?

It is well settled that the child must be born during coverture; and, so rigidly is this rule adhered to that "if the wife die in child-birth and the child is after her death, by a Caesarean section, ripped from the womb alive, no curtesy is allowed."

"The fact that the child is *en ventre sa mere* at the time of the wife's death, while reckoned by the law sufficiently in being to enable the child itself *to take an estate for its own benefit,* will not suffice to confer rights upon *third persons.*" Minor on Real Property, vol. 1, p. 283.

Under the common law a bastard was of kin to no one (*filius nullius*) or, as sometimes called, *filius populi,* and was, therefore, incapable of being the heir of any person. The rule of the Civil law was much more humane and just and enabled the father of an illegitimate child to make some reparation to his unfortunate offspring, by securing to the innocent unfortunate the *rights of inheritance* to which it is naturally entitled.

The law-making power can declare a chid born to be legitimate or illegitimate, and it is only that power that fixes and determines the *status* of children born. If born before marriage, the legislature can remove the disability of this illegitimacy, and by its transcendent power can legitimize and make capable of *inheriting* the illegitimate child. Miller *v.* Miller (N. Y.), 43 Am. Rep. 671; 4 Blackstone's Com. 36.

Most of the states have now passed statutes similar to our statute, legitimating illegitimate children under similar circumstances; but, in doing so, the legislatures were conferring rights upon the child, and not upon the parent; they were putting it in the power of the putative parent to, in part make reparation for his misconduct, by conferring upon the innocent illegitimate, the right of inheritance. This is all that can be done; the sting of illegitimacy may be softened, but not removed, either by the parent or the law-making power, save and unless it had been decreed that such licentious relations constituted a valid marriage. That this statute (Sec. 2553) does not have such effect cannot be denied, nor are "common law" marriages valid in Virginia. Offield *v.* Davis, 100 Va. 250.

If the plain purpose of § 2553 was to legitimate fruits of illicit connections and if this section does not declare that such relations constitute a valid marriage, how can it be claimed, with any degree of reason, that the effect of the statute is to make such issue "issue born during coverture," when, in fact, he was *not* "born during coverture?"

In the case of Miller *v.* Miller, *supra,* the judge, in passing upon the effect of the "Bastard Act" of one state upon parties domiciled elsewhere, on page 671, holds that there is a marked difference between the words "legitimate" and "born in lawful wedlock." In that case the famous case of Bertwhistle *v.* Vordell, 11 E. C. L. 266, is discussed. In the latter case it appears that, by the law of Scotland, a marriage legitimates a child, but the court held that such a child could not inherit land in England, because under the English Statute of Merton (20 Hen. 3, chap. 9) it is not only required that a child, in order to inherit, must be legitimate, but should be "born in lawful wedlock as well." That there is a difference between the word "legitimate," as used in such a statute and the words "born in lawful wedlock." This decision has been much criticised, it appears, because the law of Scotland was not followed, but not on account of the distinction made between the words "legitimate" and "born in lawful wedlock."

The case of Murdock *v.* Murdock (N. H.), 65 Atlantic Rep.

392, is somewhat analogous. It appears from the case that there is a statute providing for the adoption of children. That statute is not quoted in the decision, but as a matter of fact it provides that an adopted child "should bear the same relations to the adopting parents and their kindred in respect to the inheritance of property and all other incidents pertaining to the relation of parent and child as he would have if he were the natural child of such parents, etc." The adopting father claimed that such child was issue "born during coverture" and that he, therefore, was entitled to curtesy under the common law, but the court held he was not entitled to such an estate, and further states "that although the fact that their adopted child takes more, and he less, than if she were their own child, may have some tendency to prove that he ought to have such an estate, it has no tendency to prove that the legislature intended to give it to him, for he takes the same share of his wife's estate that he would have taken if they had not adopted Carrie." Section 2286a Code of Virginia, 1904, provides that curtesy shall be allowed when the common-law requisites therefor exist, and, as stated, one of these requisites is that there shall be issue born alive during coverture Section 2553 is dealing with the rights of the child; it does not expressly or by necessary implication enlarge the estate by the curtesy. If the legislature had intended to do this, it would have provided that the husband would be entitled to curtesy under the circumstances mentioned in the statute; the declaration that the child should be "legitimate" could not have the effect of repealing the plain mandate of § 2286a. The legislature was legitimatizing the child, that is, conferring upon him the right of inheritance.

"Legitimation may be defined to be the investment of an illegitimate, or one supposed to be the issue of an illegal marriage, with the *rights* of one born in lawful wedlock." 3 Am. & Eng. Enc. Law 895.

"Legitimation of bastards, either by subsequent marriage or by an act of the government, is nothing but a legal equalization of certain children illegitimately begotten with legitimate children." Bar Int. Law 434, quoted in 3 Am. & Eng. Enc. Law 895 note.

Against the view herein taken, the case of Hunter *v.* Whitworth, 9 Ala. 695, is cited. This case is apparently an authority for the position contended for by the defendant. It appears from the case that there was in Alabama a statute similar to the Virginia Statute, legitimating bastards. The decision holds that "the husband may, by a kind of legal fiction, *pro re nata,* be presumed to have married previous to the birth of the child," because marriage is the source of all legitimacy. The persuasive value of this decision is much lessened by the fact that there was another statute in Alabama which provided that "if the mother of the child and the imputed father shall at any time after its birth intermarry, the child shall in all respects be deemed and held legitimate, conformably to the maxim of the civil law."

Under the civil law legitimation was said to be "a fiction of the law whereby one born out of lawful wedlock is considered the offspring of the marriage between the parents." Cabelloro *v.* Executor, — La. 573, cited in 3 Am. & Eng. Enc. Law 895, note.

It may be that the court felt bound by the construction given to the law by the legislature when it provided that legitimacy should exist "conformably to the maxim of the civil law." But, however that may be, in the absence of any decision in Virginia holding such views, I feel constrained not to follow the reasoning of the learned judge in that case.

I am of the opinion that the solution of this question lies in the proper construction of § 2553. A child may be legitimatized and still not be born during coverture. It is not necessary to hold that he must be born in lawful wedlock in order to give full effect to the intent and purpose of the legislature, which was to confer the right to inherit property upon a child born out of wedlock, after marriage of parents and recognition, just as if he were born in "lawful wedlock." The statute does not in words or by necessary implication change the requisites for curtesy. The common law incidents of marriage can be changed only by express enactment or by necessary implication. Neely *v.* Lancaster, 58 Am. Rep. 755; Bulles *v.* Nunan, 92 N. Y. 160, 58 Am. Rep. 755.

I am, therefore, of the opinion that the defendant is not entitled to curtesy in the land in the bill mentioned.